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CONSTITUTIONALITY OF SEGREGATION ORDINANCES.

In considering the constitutionality of segregation ordinances, which promises to be one of live interest in the future when the question of the constitutionality of the various segregation ordinances shall come before the courts for consideration, as it would seem must be the case before long, a few general observations upon the constitutionality of statutes and ordinances will be pertinent. These ordinances have been enacted by many cities where the negro population is large, and have been usually based upon the principle that it is expedient for the best interest of both races that they shall live in distinct sections of the cities where such ordinances have been enacted. In their least objectionable form they declare that the question of whether a city block is to be inhabited by the white or colored race, shall be determined by the answer to the question whether a majority of the houses on said block are occupied by white or colored people. They assume that such ordinances are within the scope of the police power, and as they operate impartially upon the two races with view to keeping them separate, that they are valid. One form which such ordinances have assumed is that it shall be unlawful for any white person to move into and thereafter occupy as a residence or place of abode any house, building or structure, or any part of any house, building or structure, in any block in any street or alley in which block a greater number of houses are occupied as residences by colored people than are occupied as residences by white people. And then another clause stating the same rule as to colored persons. This would seem to be the least objectionable form of such a statute or ordinance, as it is prospective in its operation and does not disturb the existing occupancy of any such properties.

The conflict between a statute and some specific provision of the fundamental law must, in general, be clearly apparent, or the act will not be declared unconstitutional. That a statute may, in

the opinion of the court, be against the spirit of the constitution, or against the policy of the government, is not sufficient.[1] But the rule is different as to ordinances, where such an objection may be enough. In the convention which framed the federal constitution it was proposed to vest in the judiciary a qualified negative on all legislation, but the proposal was rejected. See 3 Madison Papers, 1332.

CONSTITUTIONAL PROVISIONS TO BE CONSIDERED.

Of course the principal constitutional limitations on the power of the legislature, or a municipal corporation under its delegated legislative powers, to pass a segregation law, will be found in the Fourteenth Amendment to the Federal Constitution, if anywhere. The three provisions with which we are concerned are:

1. That no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

2. Nor shall any state deprive any person of life, liberty or property, without due process of law.

3. Nor deny to any person within its jurisdiction the equal protection of the laws.

And it is to the second or third of these clauses, or both, that such legislation would be obnoxious, if to any of them. The clause as to the privileges and immunities of citizens seems inapplicable on well settled principles.[2]

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1. Wadsworth *v.* Union Pac. R. Co., 18 Colo. 600; Beyman *v.* Black, 47 Tex. 558; Knoxville *v.* Bird, 12 Lea 126, 47 Am. Rep. 326; People *v.* Rosenberg, 138 N. Y. 410. But see Citizens' Sav., etc., Asso. *v.* Topeka, 20 Wall. 663, 22 L. Ed. 461, where it is said that there are limitations on legislative power "which grow out of the essential nature of all free governments."

2. **Privileges and immunities of citizens clause inapplicable.**— The privileges and immunities of citizens of the United States under the Fourteenth Amendment are those which arise out of the nature and essential character of the national government, the provisions of the Constitution or its laws and treaties made in pursuance thereof. Privileges and immunities belonging to the citizens of a state as such are not embraced by that amendment. Butcher's Benev. Asso. *v.* Crescent City L. S. L. & S. H. Co. (Slaughter-House Cases), 16 Wall. 36, 21 L. Ed. 394. The main purpose

Of course the provision of the bill of rights, against deprivation of property without due process of law, coincides, in part, with the second of these.

It will be noted that the provision that all citizens of the state are hereby declared to possess equal, civil and political rights and public privileges, in the Virginia Constitution of 1869, was omitted from that of 1902.

One other provision of the state constitution might be invoked, namely, the first section of the bill of rights: That "all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." This is broad language, but even as to life and liberty does not confer an absolute right, that cannot be regulated or even taken away entirely for just cause—salus populi suprema lex, is a higher law and prevails over it, being the foundation of the police power. If public policy, in the opinion of the legislative body, calls for regulation and limitation of otherwise absolute rights, with any show of reasonableness and not contrary to a prohibition in the organic law, such regulation and limitation is lawful and valid.

In some of the earlier cases the federal supreme court and some state courts used very sweeping language, but the supreme court was condemning state legislation as denying the negroes the equal protection of the laws by making juries in criminal cases exclusively white.[3]

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of the last three amendments to the United States Constitution was to place the colored race in respect to civil rights upon a level with the white. Ex parte Virginia, 100 U. S. 313, 25 L. Ed. 667; Butcher's Benev. Asso. *v.* Crescent City L. S. L. & S. H. Co. supra; Strauder *v.* West Virginia, 100 U. S. 303, 25 L. Ed. 664. See note to Louisville Safety Vault, etc., Co. *v.* Louisville, etc., R. Co. (Ky.), 14 L. R. A. 579.

3. Thus it is said: The Fourteenth Amendment ordains that no state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly-made citizens, who, being citizens of the United States, are declared to be also citizens of the state in which they

And in a case decided by the West Virginia Supreme Court in 1889, declaring a scrip act unconstitutional, it was said: "The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens and not of others, when there is no public necessity for such discrimination, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law, and the mass of the community, and those who make the law, by another; whereas, a like general law, affecting the whole community equally, could not have been enacted."[4]

Discriminatory Legislation Generally.

All legislation which discriminates against any particular race or class of persons is in violation of the Constitution of the United States. An emphatic statement of the view taken by the few courts that have rendered decisions in sympathy with the position of Justice Harlan in his dissent from the separate coach laws decisions of the Supreme Court, will be found in the note below.[5]

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reside.) It ordains that no state shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race. Strauder *v.* West Virginia, 100 U. S. 303, 307, 25 L. Ed. 664.

4. State *v.* Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 623.

5. Dawson *v.* Lee. 83 Ky. 50; Markham *v.* Manning, 96 N. C. 132; State *v.* Duggan, 15 R. I. 403, 3 New Eng. Rep. 137; Ferguson *v.*

The Fourteenth Amendment was ordained to secure equal rights to all persons, and extends its protection to races and classes, and prohibits any state legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.[6] But whenever the law operates alike upon

Gies, 82 Mich. 358, 46 N. W. 718, 9 L. R. A. 589. See note to this last case.

It is said in Ferguson *v.* Gies, 82 Mich. 358, 46 N. W. 718, 9 L. R. A. 589, 592: "Any discrimination founded upon the race or color of the citizen is unjust and cruel, and can have no sanction in the law of this state. The cases which permit in other states the separation of the African and the white races in public places can only be justified on the principle that God made a difference between them, which difference renders the African inferior to the white, and naturally engenders a prejudice against the African, which makes it necessary for the peace and safety of the public that the two races be separated in public places and conveyances. This doctrine which runs through and taints justice in all these cases is perhaps as clearly and ably stated in 55 Pa. 209, as anywhere. In that case Judge Agnew says: 'If a negro takes his seat beside a white man, or his wife or daughter, the law cannot repress the anger or conquer the aversion which some will feel. However unwise it may be to indulge in the feeling, human infirmity is not always proof against it. * * * To assert separateness is not to declare inferiority in either. It is not to declare one a slave and the other a freeman. That would be to draw the illogical sequence of inferiority from difference only. It is simply to say that, following the order of Divine providence, human authority ought not to compel these widely-separated races to intermix. The right of each to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations as far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice or caste, but simply to suffer men to follow the law of races established by the Creator Himself, and not to compel them to intermix contrary to their instincts.' This reasoning does not commend itself either to the heart or judgment. The negro is here, and brought here by the white man. He must be treated as a freeman or as a slave; as a man or a brute." But not many courts have taken this view.

6. Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676; Civil Rights Cases, 109 U. S. 3, 24, 27 L. Ed. 835; Pace *v.* Alabama, 106 U. S. 583, 27 L. Ed. 207; Missouri *v.* Lewis, 101 U. S. 22, 25 L. Ed. 989;

all persons and property similarly situated, equal protection cannot be said to be denied.[7]

The Police Power.—The rule that the Fourteenth Amendment does not interfere with the police power of the states, so far as it affects alike all who are similarly situated, although it may be limited in its application, applies to ordinances against washing in public laundries within certain portions of a city, during certain hours of the night or on Sunday.[8]

Gibson *v.* Mississippi, 162 U. S. 565, 582, 40 L. Ed. 1075; Williams *v.* Mississippi, 170 U. S. 213, 219, 42 L. Ed. 1012; Hodges *v.* U. S., 203 U. S. 1, 51 L. Ed. 65.

Its object was to place the negro race, with respect to his civil rights, upon the same level as the white. Virginia *v.* Rives, 100 U. S. 313, 25 L. Ed. 667; Strauder *v.* West Va., 100 U. S. 303, 25 L. Ed. 664; Gibson *v.* Mississippi, 162 U. S. 565, 40 L. Ed. 1075; Plessy *v.* Ferguson, 163 U. S. 537, 41 L. Ed. 256; Williams *v.* Mississippi, 170 U. S. 213, 219, 42 L. Ed. 1012.

7. Walston *v.* Nevin, 128 U. S. 578, 32 L. Ed. 544.

8. **The police power.**—Barbier *v.* Connolly, 113 U. S. 27, 28 L. Ed. 923; Soon Hing *v.* Crowley, 113 U. S. 703, 28 L. Ed. 1145. See note to Louisville Safety Vault, etc., Co. *v.* Louisville, etc., R. Co. (Ky.), 14 L. R. A. 579, 584.

But it is not within the power of the legislature, under the pretense of exercising the police power of the state, to enact laws, not necessary to the preservation of the health and safety of the community, that will be oppressive and burdensome upon the citizen. Toledo, W. & W. R. Co. *v.* Jacksonville, 67 Ill. 40; King *v.* Davenport, 98 Ill. 314. See note to State *v.* Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 622.

To forbid an individual or a class the right to the acquisition or use or enjoyment of property in such a manner as should be permitted to the community at large, would be to deprive them of liberty in particulars of primary importance to their pursuit of happiness. Cooley, Const. Lim. 485-487; Wynehamer *v.* People, 13 N. Y. 433. Such legislation is invalid, as subversive of rights of citizens guaranteed by the state and federal constitutions. Fifth and Fourteenth Amendments U. S. Const.; State Const., art. 1, § 1; Wynehamer *v.* People, 13 N. Y. 398; Boyd *v.* United States, 116 U. S. 635, 29 L. Ed. 752; Barbier *v.* Connolly, 113 U. S. 31, 28 L. Ed. 924; Intoxicating Liquor Cases, 25 Kan. 765; Bertholf *v.* O'Reilly, 74 N. Y. 509, 515. The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, under similar circumstances; and every partial or pri-

Class Legislation Unconstitutional and Void.—The constitutional rights of the citizens to life, liberty and property are wholly unlimited and unrestricted, except by considerations of the public good; and no abridgment or deprivation of these rights by the Legislature will be upheld or enforced, except as a regulation of police, operating to the benefit of all individuals of the community equally.[9]

POWER OF MUNICIPAL CORPORATION TO PASS ORDINANCES GENERALLY AND THESE ORDINANCES IN PARTICULAR.

Municipal ordinances, being legally enacted, have the force of laws passed under the legislature of the state and are to be respected by all.[10] And the full measure of legislative discretion

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vate law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. People *v.* Marx, 99 N. Y. 377. From note to State *v.* Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 622.

9. Class legislation unconstitutional and void.—Corfield *v* Coryell 4 Wash. C. C. 380; Cooley, Const. Lim. 4th Ed. 719; Potter's Dwarris, Stat. 458; Austin *v.* Murray, 16 Pick. 121, 126; Watertown *v.* Mayo, 109 Mass. 315, 319; Re Cheesebrough, 78 N. Y. 232. The words "the law of the land," mean general public law, binding upon all the members of the community, under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals. Janes *v.* Reynolds, 2 Tex. 251. See, also, Wynehamer *v* People, 13 N. Y. 432; Vanzant *v.* Waddel, 2 Yerg. 269; Cooley, Const. Lim. 352. The law will not allow the rights of property to be invaded under the guise of a police regulation for the promotion of health, when it is manifest that such are not the object and purpose of the regulation. Austin *v.* Murray and Watertown *v.* Mayo, supra; Re Jacobs, 98 N. Y. 109. See note to State *v.* Goodwill, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621.

10. Municipal ordinance as law.—New Orleans Water Works Co *v.* New Orleans, 164 U. S. 471, 481, 41 L. Ed. 518. See 28 Cyc. 391.

An ordinance of a municipal corporation may be such an exercise of municipal power delegated by the legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, as to be properly considered a law. New Orleans Water Works Co. *v.* Louisiana Sugar Ref. Co., 125 U. S. 18, 31, 31 L. Ed. 607; Hamilton Gas Light, etc., Co. *v.* Hamilton City, 146 U. S. 258, 36 L. Ed. 963; Walla Walla City *v.* Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341; St. Paul Gas Light Co. *v.* St. Paul, 181 U S. 142, 148, 45 L. Ed. 788.

seems to be conceded to the legislative body of the municipality as of the state.[11] Although, naturally, a court would hesitate longer in declaring a statute unconstitutional than it would a municipal ordinance.[12] And an ordinance may be annulled by the courts because it seems to the judicial mind unreasonable or oppressive, although a statute may not.[13]

Interference with Private Legal Rights.—An ordinance must not be unreasonable as an interference with private legal rights.[14] But it will be found that most of these cases qualify the rule expressly or impliedly by an exception where the public good requires it, so that, in the last analysis, the validity of legislation limiting and qualifying he ordinary legal rights of individuals depends upon whether the public good requires such legislation. If it does, or if the courts cannot say positively that there is no reasonable ground for such legislation, then, if no other constitutional prohibitions are infringed, such legislation should be upheld by the courts.

HOW THE COURTS HAVE REGARDED OTHER RACIAL LEGISLATION.

Separate Coach Laws.—Furnishing separate but equal accommodations for white and colored persons on railroads is not a denial of equal privileges and immunities.[15]

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11. Legislative discretion.—Knapp, etc., Co. *v.* St. Louis, 156 Mo. 343, 56 S. W. 1102; Estes *v.* Owen, 90 Mo. 113, 23 S. W. 133; Seibert *v.* Tiffany, 8 Mo. App. 33. See 28 Cyc. 365.

12. Greensboro *v.* Ehrenreich, 80 Ala. 579, 2 So. 725, 60 Am. Rep. 130.

13. Unreasonableness and oppressiveness.—Yick Wo. *v.* Hopkins, 118 U. S. 356, 30 L. Ed. 220; Kirkham *v.* Russell, 76 Va. 956, and many other cases cited in 28 Cyc. 369.

14. Interference with private legal rights.—28 Cyc. 763, where a great many cases are cited.

15. How the courts have regarded other racial legislation—Separate coach laws.—Plessy *v.* Ferguson, 163 U. S. 537, 548, 41 L. Ed. 256; Britton *v* Atlanta, etc., Air Line R. Co., 88 N. C. 536, 43 Am. Rep. 749. See note to Louisville Safety Vault, etc., Co. *v.* Louisville, etc., R. Co. (Ky.), 14 L. R. A. 579.

"The enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment." Plessy *v.* Ferguson, 163 U. S. 537, 548, 41 L. Ed. 256

Regulations of Carrier as to Separation of Races.—Congressional inaction is equivalent to a declaration that a carrier may, by its regulations, separate white and negro interstate passengers.[16]

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16. Regulations of carrier.—Chiles *v.* C. & O. Ry. Co., 218 U. S. 71; West Chester, etc., R. Co. *v.* Miles, 55 Pa. 209.

In Hall *v.* DeCuir, 95 U. S. 485, 24 L. Ed. 547, it was held that the inaction of Congress was equivalent to the declaration that a carrier could, by regulations, separate colored and white interstate passengers. In Plessy *v.* Ferguson, 163 U. S. 540, 41 L. Ed. 257, 16 Sup. Ct. Rep. 1138, a statute of Louisiana which required railroad companies to provide separate accommodations for the white and colored races was considered. The statute was attacked on the ground that it violated the Thirteenth and Fourteenth Amendments of the Constitution of the United States. The opinion of the court, which was by Mr. Justice Brown, reviewed prior cases, and not only sustained the law, but justified as reasonable the distinction between the races on account of which the statute was passed and enforced. It is true the power of a legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, as it was declared to be, "the established usages, customs, and traditions of the people," and the "promotion of their comfort and the preservation of the public peace and good order," this must also be the test of the reasonableness of the regulations of a carrier, made for like purpose and to secure like results. Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate cannot be said to be unreasonable. See, also, Chesapeake & O. R. Co. *v.* Kentucky, 179 U. S. 388, 45 L. Ed. 244, 21 Sup. Ct. Rep. 101. The extent of the difference based upon the distinction between the white and colored races which may be observed in legislation or in the regulations of carriers has been discussed so much that we are relieved from further enlargement upon it. See Mr. Justice Clifford's concurring opinion in Hall *v.* DeCuir for a review of the cases. They are also cited in Plessy *v.* Ferguson at page 550. Chiles *v.* C. & O. Ry. Co., 218 U. S. 71, 20 Sup. Ct. Rep. 667, 669.

But such separation of the colored passengers cannot be justified unless the cars set apart for their exclusive use are as safe and comfortable and otherwise equal in the quality of their accommodations to those furnished to white persons who pay the same fare. Houck *v.* Southern Pac. R. Co., 38 Fed. Rep. 226; Logwood *v.* Memphis, etc., R. Co., 23 Fed. Rep. 318; Murphy *v.* Western & A. R. Co., 23 Fed. Rep. 637; Gray *v.* Cincinnati S. R. Co., 11 Fed. Rep. 684; Civil Rights Bill, 1 Hughes, 541; Council *v.* Western & A. R. Co. supra; Heard *v.* Georgia R. Co., 2 Inters. Com. Rep. 508. Where a respect-

Right to Be Jurors and Witnesses.—The denial to colored citizens of the right and privilege of being jurors because of their color, although qualified in all other respects, is prohibited by the Fourteenth Amendment and its guaranty of equal protection of the laws.[17]

Separate Schools.—Establishing separate schools for white and colored children does not deprive them of the equal protection of the laws.[18]

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able colored woman was compelled to ride on the platform of a car because she was not allowed to go in the first-class car and was afraid to ride in the other car known as the "Jim Crow" car because it was occupied by rough men, both white and colored, a recovery of damages was allowed. The amount found being $2,000 punitive damages and $3,000 actual damages, a remittitur of $2,500 from the actual damages was required as a condition of refusing a new trial. Houck *v.* Southern Pac. R. Co., supra. See The Sue, 22 Fed. Rep. 843; Britton *v.* Atlantic, etc., R. Co., 88 N. C. 536, 43 Am. Rep. 749; Coger *v.* North Western, etc., Co., 37 Iowa 147; West Chester & P. R. Co. *v.* Miles, 55 Pa. 209; State *v.* McCann, 21 Ohio St. 210; People *v.* Gallagher, 93 N. Y. 438, 45 Am. Rep. 232; Cory *v.* Carter, 48 Ind. 337, 17 Am. Rep. 738; State *v.* Duffy, 7 Nev. 342; People *v.* Easton, 13 Abb. Pr. N. S. 160; Louisville, N. O. & T. R. Co. *v.* State, 66 Miss. 662, 5 L. R. A. 132; Lehew *v.* Brummell, 103 Mo. 546; Dawson *v.* Lee, 83 Ky. 49; Ward *v.* Flood, 48 Cal. 36, 17 Am Rep. 405; Chesapeake, O. & S. W. R. Co. *v.* Wells, 85 Tenn. 613; Bertonneau *v.* City Schools Board of Directors, 3 Woods, C. C. 177.

West Chester & P. R. Co. *v.* Miles, 55 Pa. 209, and Roberts *v.* Boston, 5 Cush. 198 (upholding separate schools), were both rendered before the adoption of the Fourteenth Amendment, but in states where the civil rights of the colored race were fully recognized.

17. Right to be jurors and witnesses.—Strauder *v.* West Virginia, 100 U. S. 303, 25 L. Ed. 664; Neal *v.* Delaware, 103 U. S. 370, 26 L. Ed. 567; Bush *v.* Kentucky, 107 U. S. 110, 27 L. Ed. 354; Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676; Ex parte Virginia (Virginia *v.* Rives) 100 U. S. 313, 25 L. Ed. 667. This applies to a grand jury as well as to a petit jury. Bush *v.* Kentucky, Ex parte Virginia, and Neal *v.* Delaware, supra. See note to Louisville Safety Vault, etc., Co. *v.* Louisville, etc., R. Co. (Ky.), 14 L. R. A. 579, 581.

18. Separate schools.—Lehew *v.* Brummel, 103 Mo. 546, 11 L. R. A. 828.

A large number of cases uphold the doctrine that separate schools may be provided for colored children, if they are reasonably access-

CONCLUSIONS.

It being well settled that a law which authorizes or requires the separation of the two races in public conveyances is not obnoxious to the Fourteenth Amendment, provided there is no *discrimination against either race,* i. e., provided the accommodations are equal, it would seem that whether the same principle will support the segregation laws, depends upon *whether there is a reasonable ground for drawing the legal distinction,* and upon whether there is created a situation which materially affects the civil and particularly the property rights of either race and discriminates against one or the other.

Equal protection cannot be said to be denied whenever the law operates alike upon all persons and property similarly situated;[19] and legislation limited as to objects or territory does not infringe on the constitutional right of equal protection where all persons subject to it are treated alike under like circumstances and conditions.[20]

It must be remembered that the federal supreme court has put itself on record as fixing the principle that in determining whether a legal distinction based on racial lines is discriminatory against either race, a court cannot look at the question from the standpoint which either race has chosen to take in regarding the legislation

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ible and afford substantially equal educational advantages with those provided for white children. State *v.* McCann, 21 Ohio St. 198; Bertonneau *v.* Board of Directors, 3 Woods, 177; Ward *v.* Flood, 48 Cal. 36, 45; Cory *v* Carter, 48 Ind. 327; Roberts *v.* Boston, 5 Cush. 198; People *v.* Easton, 13 Abb. Pr. N. S. 159; Dallas *v.* Fosdick, 40 How. Pr. 249; United States *v.* Buntin, 10 Fed. Rep. 730; People *v.* Gallagher, 93 N. Y. 438.

19. Walston *v.* Nevin, 128 U. S. 578, 32 L. Ed. 544; State *v.* Schlemmer, 10 L. R. A. 135, 42 La. Ann. 1166; Vermont Loan & T. Co. *v* Whithed (N. Dak.), July 14, 1891; State *v.* Moore, 104 N. C. 714; Ex parte Swann, 96 Mo. 44; Barbier *v.* Connolly, 113 U. S. 32, 28 L. Ed. 925; Sonn Hing *v.* Crowley, 113 U. S. 709, 28 L. Ed. 1147; Re Dolphe (Colo.) Dec. 21, 1891. See note to Louisville Safety Vault, etc., Co. *v.* Louisville, etc., R. Co. (Ky.), 14 L. R. A. 579, 583.

20. Hayes *v.* Missouri, 120 U. S. 68, 30 L. Ed. 578. Special legislation is not obnoxious to this provision if all persons subject to it are treated alike. Missouri Pac. R. Co. *v.* Mackey, 127 U. S. 205, 32 L. Ed. 107; Minneapolis & St. L. R. Co. *v.* Herrick, 127 U. S. 210, 32 L. Ed. 109.

in question. Because the colored race has chosen to consider itself aggrieved by distinctions drawn between them and the white race, is no reason why the courts should so regard it, when, looking at the question from the view point of the law, and having regard to fact that, in the eye of the law the negro and the white man must be regarded as on an equal footing, the law must say that the legislation which in the same terms requires each race to respect and obey the distinctions laid down by it, does not discriminate against the colored race any more than it does against the white. It must be color blind, in other words.[21]

It is the conclusion of the writer that such legislation will not be overthrown on the ground that it denies equal protection of the laws, where it does not arbitrarily set apart certain portions of a city for the residence of each race, but merely requires the residential districts to be allotted to each to be automatically determined by principles which apply without discrimination to each race. But if such an ordinance undertakes to arbitrarily set apart residential districts for each race, it would seem that, however good its intention to be fair to each, such an assignment could not even theoretically be considered a law operating equally upon each race. Practically, of course it would assign an inferior section to the colored race, although this would be the only possible assignment which would not require wholesale removals and a complete upheaval and disturbance of actual conditions as they now exist, and would be the practical result of any assignment, however determined. Such an ordinance, requiring the removal of all Chinese residents in a city to a delimited district, has been held clearly invalid as an unconstitutional discrimination and deprivation of property.[22]

It will be noted that the argument urged perhaps most strongly

21. Plessy *v.* Ferguson, 163 U. S. 537, 551, 41 L. Ed. 256, where the court said: "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."

22. An ordinance requiring all Chinese inhabitants to remove outside the city and county or to some other part of the city and county from the portion of the city theretofore occupied by them violates their constitutional rights. Re Lee Sing, 43 Fed. Rep. 359.

against upholding the constitutionality of the separate coach and public accommodation legislation, both by counsel and in the dissenting opinion of Mr. Justice Harlan, was that the same principle could be invoked to sustain such legislation as the segregation ordinances or statutes. The answer of the court to this was that such laws must be reasonable and enacted in good faith for the public good.[23] And there is a large discretion in the legislative body in determining the question of reasonableness.[24]

23. Plessy *v.* Ferguson, 163 U. S. 537, 549, 41 L. Ed. 256, when the court said: "In this connection, it is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class. Thus in Yick Wo. *v.* Hopkins, 118 U. S 356, it was held by this court that a municipal ordinance of the city of San Francisco, to regulate the carrying on of public laundries within the limits of the municipality, violated the provisions of the Constitution of the United States, if it conferred upon the municipal authorities arbitrary power, at their own will, and without regard to discretion, in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the places selected for the carrying on of the business. It was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race. While this was the case of a municipal ordinance, a like principle has been held to apply to acts of a state legislature passed in the exercise of the police power. Railroad Company *v.* Husen, 95 U. S. 465; Louisville & Nashville Railroad *v.* Kentucky, 161 U. S. 677, and cases cited on p. 700; Daggett *v.* Hudson, 43 Ohio St. 548; Capen *v.* Foster, 12 Pick. 485; State ex rel. Wood *v.* Baker, 38 Wisconsin, 71; Monroe *v.* Collins, 17 Ohio St. 665; Hulseman *v.* Rems, 41 Penn. St. 396; Orman *v.* Riley, 15 California 48."

24. **Discretion of Legislative Body.**—The federal Supreme Court

The question as to whether there would be a deprivation of property without due process of law by an ordinance of the least objectionable character as indicated above, would seem to be a closer one, and yet, it would not seem that such legislation should be struck down upon this ground, if proper safe-guards of property rights, as distinguished from the personal right to occupy and live in property, were provided. If the right to hold and lease to the other race, properties owned by members of each race in the districts set apart for inhabitancy by the other race, were not interferred with, it would not seem to be a deprivation of a property right to invalidate the law. The limitation of the possible tenants for such property to members of the race allotted by the law to live in that block, would be no more than the practical limitation which now exists to the race which is in majority in any section or block. Indeed, the distinction, if it be a discrimination, would operate more hardly upon the white then upon the colored race, as the latter invariably and necessarily occupy sections where rents and property values are low, and a change produced by such an ordinance in transforming a block from a white to a colored residence block would practically operate more injuriously upon white owners of property therein, than a corresponding change the other way would operate upon the colored owners of property therein. Indeed in the latter case property values would naturally rise, just as in the former case they would naturally fall. So we may very possibly see the ordinance assailed by a white property owner who considers

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said in one case: "So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures." Plessy *v.* Ferguson, 163 U. S. 537, 550, 41 L. Ed. 256.

himself aggrieved by its operation upon the rental and sale value of his property in a block where the majority of the residents are colored. Whether such an attack would be successful, must be regarded as a close question. And yet, reverting the standpoint from which the law must regard the two races, we are again confronted with the principle that in the eye of the law one race is as good as the other, and that, as such a change ought not to affect the value of property, ergo, a court will not take notice of the practical fact that it does, and therefore must hold such legislation valid.

Limitation of Use as Taking of Property.—Investigation into the cases has lead the writer to think that another constitutional limitation might be invoked, viz, that prohibiting the taking or damaging of private property for public use without just compensation. Two Missouri cases have held that the unrestricted use or enjoyment of property is a constituent part of property, and hence that legislation which deprives the owner of a substantially valuable use of his property, takes his property to the extent that its value is diminished.[25]

Of course the raising of this point at all would depend upon whether the court would take cognizance of the conditions which would necessarily cause a deprivation of value to follow from the limiting the use or occupancy of property to the colored race. But if the courts can take into consideration the conditions which are the only excuse for such legislation, namely, that there is racial antagonism and that there are racial differences which justify laws intended to keep the races separate, it is hard to see why they should not take ognizance of precisely the same condi-

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25. Limiting use as taking of property.—St. Louis *v.* Hill (Mo.), 21 L. R. A. 226; St. Louis *v.* Dorr, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, 68 Am. St. Rep. 575, 42 L. R. A. 686.

There is a taking of property within the meaning of the constitution when the owner of a lot fronting on a boulevard is, by authority of a statute or ordinance, prohibited from building upon a certain portion of it between a building line thereby established and the street. St. Louis *v.* Hill (Mo.), 21 L. R. A. 226.

And an ordinance declaring a portion of an avenue to be a boulevard on which the houses shall be used only for residences is an unconstitutional invasion of the right of private ownership of property. St. Louis *v.* Dorr, 145 Mo. 466, 42 L. R. A. 686.

tions as necessarily causing a depreciation of property limited to negro occupation by such legislation.

But, it might be urged that, so far as the court was concerned, such consequences would be post hoc and not propter hoc, and would not be facts, of which it could take notice as such, but anticipated and probable consequences yet unrealized and not due to any inherent vice in the legislation in question. Such would perhaps be the answer to the argument urged above, and it might be sufficient. The great difficulty of dealing with such questions lies in the impossibility of applying logical reasoning to the actual conditions and the theoretical assumptions of the Fourteenth Amendment with regard to the colored race, without being lead to assume and defend positions and legislation that are, to say the least, very difficult to maintain by logical argument. And yet these Missouri decisions are probably exceptional, and it would probably properly be held that such depreciation resulting from such legislation should be considered, not a taking of the property, but as an injury resulting from the exercise of the police power, for which compensation need not be made. Indeed this case is substantially different from the cases above cited, where the use of the property for a certain space from the street line was forbidden so as practically to enlarge the public street, or where the use of property in a residential district for business purposes was prohibited for the benefit of the public.

To conclude, Tiedeman on Limitations of Police Power, § 122, says: "The reasonable enjoyment of one's real estate is certainly a vested right which cannot be interfered with or limited arbitrarily. The constitutional guaranty of protection for all private property extends equally to the enjoyment and the possession of lands. . . . It is not difficult to find the rule which determines the limitations upon the lawful ways or manner of using lands. It is the rule, which furnishes the solution of every problem in the law of police power, and which is comprehended in the legal maxim, sic utere tuo ut alienum non lædas. One can lawfully make use of his property only in such a manner as that he will not injure another."

JAMES F. MINOR.

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